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NO. 84-798

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Plaintiff-Respondant

V.

GEORGE S. McLEAN,
Defendant, Petitioner

PETITIONER'S SUPPLEMENTAL BRIEF INVITING ATTENTION TO A RECENTLY UNCOVERED HARVESTER PROXY STATEMENT WHICH FURTHER SUPPORTS THE PETITIONER'S SCAPEGOAT ARGUMENT.

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I. REASON FOR SUPPLEMENTAL BRIEF PER RULE 22.6

A recent search for background information to be used in a related civil action uncovered newspaper articles and an International Harvester proxy statement dated September 30, 1982 which provided the final pieces of the puzzle relating to the manner in which the Petitioner is described in the Crawford indictment, the timing of the Harvester guilty plea and the how and why the Government and Harvester joined together to set up the Petitioner as the Harvester scapegoat.

II. HARVESTER FINANCIAL PICTURE

During the year preceding the Crawford indictment and Harvester guilty plea, the Wall Street Journal reported as follows concerning Harvester's financial condition:

1. October 1, 1981: Harvester asks 200 of its worldwide lenders to participate in its new $4.15 billion rescue plan.

2. December 23, 1981: Harvester, on December 22, 1981, said that all 200 banks holding its $4.15 billion of debt agreed to a two-year refinancing package.

3. April 2, 1982: Harvester has told its creditors it will technically be in default on its $4.2 billion loan agreement by the end of April 1982.

4. April 21, 1982: Harvester, in an attempt to avoid having to file under federal bankruptcy law, is renegotiating a $4.2 billion debt restructuring agreement it completed just five months ago.

5. September 14, 1982: Harvester and a committee of its lenders reached tentative agreement as to the terms of a new debt restructuring agreement; Harvester will have a special meeting of its shareholders on October 28, 1982 to seek an increase in the number of its authorized common shares and an approval of an additional offering.

6. October 7, 1982: Harvester presented the grimmest assessment yet of its financial condition in proxy material for an October 28, 1982 special meeting which stated the company's prospects for survival are in substantial doubt and conceded that by October 31, 1982 it could have negative shareholders equity. The company says without the stockholders' approval of the latest debt restructuring, it likely would be forced into bankruptcy proceedings.

On page F-27 of the proxy statement, Harvester's certified public accountants, Deloitte, Haskins & Sells stated that,

> Harvester's continuation as a going concern may be dependent upon successful completion of the financial restructuring and further noted that its financial condition has deteriorated to the point that the company no longer is confident that the resulting liability [of a $3 million suit relating to its former Wisconsin Steel Division], if any, would not materially affect its financial condition.

III. SEPTEMBER 30, 1982 HARVESTER PROXY STATEMENT

There was not a single word of Harvester's potential multimillion dollar liability in the Crawford case mentioned in the September 30, 1982, 104 page proxy statement, although Harvester was a target of the investigation and at that point had been negotiating with the Government for many weeks. Against this background, it is understandable that Harvester could not and would not plead

guilty to any violation relating to the Crawford investigation prior to the October 28, 1982 stockholders' meeting which would determine their survival.

IV. THE CRAWFORD INDICTMENT

On October 18, 1982, the Petitioner, against the advice of his (Harvester appointed and paid for) lawyer, sought to give testimony without immunity to the Houston grand jury. The Government attorney refused, saying it was "too late," although the grand jury continued to hear testimony on October 19, 1982 and the Petitioner was in Houston available to testify on October 19, 1982. The Government lawyers quickly wound up their grand jury business at that point and brought the Crawford indictment to a vote the next day, October 20, 1982.

The FCPA has seven distinctly different classes of violations, three relating to issuers and four to domestic

concerns with widely ranging prescribed penalties. The Eckhardt amendment's purpose is to protect certain Sixth Amendment rights of two of these classes, agents and employees of issuers and domestic concerns. Because of these distinctions, it is necessary to identify each defendant in an FCPA indictment by class.

The Crawford indictment identified each of the defendants as "a domestic concern," "an officer and stockholder of a domestic concern and a domestic concern," "an officer of a domestic concern and a domestic concern," "an agent of a domestic concern," or "an officer of a domestic concern" except for the Petitioner and Uriarte who were described simply as defendants. P. at 5. [1/]

[1/] P. - Petition for Cert.

V. THE CRAWFORD INDICTMENT TIMING PROBLEM

Because the Government was forced to bring the Crawford indictment to a vote prior to the Harvester guilty plea, they were in a technical dilemma. If they described the Petitioner as "an individual of a domestic concern," they would have precluded Harvester's urging to the Court, the press and the S.E.C. that their guilty plea was based solely on a theory of respondeat superior because a corporation is not responsible for criminal activities of its employees outside the scope of their employment. Inland Trucking Co. v. United States, (1960) 281 F.2d 457. On the other hand, if the Government had described the Petitioner as aiding and abetting as "an employee of an issuer," (who reported directly to a corporate officer), then Harvester would have been facing a maximum penalty of $43 million (43 counts

X $1 million) because the act of an employee with the knowledge and consent of the corporation is the act of the corporation in determining criminal responsibility. Morgan v. United States, C.C.A. La. (1945) 149 F.2d 185, cert. denied 326 U.S. 731. (Ruston Gas Turbines was fined $750,000 when they pled guilty to a single substantive count.) P. at 5.

The concept of criminal liability for corporations on the theory of respondeat superior is very narrow in that the conduct of the guilty employee must be the kind he is authorized to perform, it must occur substantially within the authorized limits of time and space, and must be activated at least in part by a desire to serve the employer. United States v. Demauro, C.A. N.Y., 1979, 581 F.2d 50.

The Government was obliged to describe the Petitioner within an FCPA

prescribed class of violator in the Crawford indictment and since the Harvester plea bargain was not yet a fait accompli on October 22, 1982, this created a severe problem for the Government who had no other candidates to set up as the respondeat superior scapegoats other than the Petitioner and Uriarte. The Government also desired to deny them the protection of the Eckhardt amendment. The Government's solution to this dilemma was to describe the Petitioner simply as a "defendant" and hope no defense lawyer revealed their chicanery.

VI. THE GOVERNMENT'S CHANGING POSITION

After the Harvester plea, the Government shifted gears. During a May 23, 1983 hearing while arguing against the Petitioner's motion to dismiss based on the Eckhardt amendment, the Government lawyer said,

"Our theory has been consistent not

> only before the Harvester plea, but at the time of the return of the indictment, October of 1982, almost a month before Harvester pled. That is, we are presented with a factual pattern where employees of an issuer engaged in conduct as conspirators, co-conspirators and aiders and abettors. That is specifically set forth in the indictment and there is no attempt to circumvent the factual conduct that is alleged, both for defendant Uriarte and defendant McLean. The issue as the Government sees it for the Court is a very simple one. In this kind of factual pattern where you have employees of an issuer and indeed an issuer, co-conspiring, aiding and abetting others, other classes, how do you charge them?" Tr. at 20, 21 (emphasis added).

Yet in the Government's brief on appeal they stated,

> "The theory of prosecution is not that appellees, employees of an issuer, violated §77dd-1(a). Rather, the Government's theory was that appellees as individuals aided and abetted Crawford Enterprises, a domestic concern, in a violation of §78dd-2(a)." Br. at 22 (emphasis added).

But during the ensuing Fifth Circuit hearing, the Government conceded the Petitioner acted only on behalf of and for the benefit of his employer, Harvester,

and that the Petitioner was not a renegade employee. United States v. McLean, 738 F.2d 655 at 659. (Emphasis added.)

VII. THE HARVESTER PLEA BARGAIN

It is now history that Harvester successfully urged respondeat superior on their trial court with the Petitioner and Uriarte named but not charged as their scapegoats. The acceptance by the Court of this plea resulted in a $10,000 fine and saved Harvester from facing a multi-million dollar liability and possible bankruptcy. P. at 5-10.

And by falsifying material statements in the offer of proof, e.g. "Neither Solar employee [Uriarte and the Petitioner] held a position which required him to report to International Harvester management. There has been no evidence that any officers, directors or management knew of or participated in the conspiracy charged in the information," and by withholding certain

key factual information, the Harvester and Government lawyers did successfully conceal from the Harvester trial court, the S.E.C., the press and Harvester's lenders, stockholders and employees certain critical facts in the case, namely that,

1. The Petitioner and Sievert were part of Harvester's corporate management.

2. Sievert was also a corporate vice-president and officer.

3. The Petitioner reported directly to Sievert.

4. Sievert was still designated as a target at the time of the plea.

5. The Government considers Sievert a co-conspirator.

6. Sievert was a participant in Overt Act No. 24 in the Crawford case which was omitted from the Harvester case.

7. Sievert and not the Petitioner participated in the January 24, 1979 meeting described in Overt Act No. 11.

Each and every one of the above described falsifications or omissions was required to support the theory of respon-

deat superior.

VIII. SUMMARY

The McLean court at 659 recognized that an objective of the Eckhardt amendment is to prevent the employer from making its employee a scapegoat. In this case, Harvester could not have succeeded in their effort without the conspiratorial assistance of the Government lawyers who falsified the Harvester court papers, with absolute personal immunity, Yaselli v. Goff, 275 U.S. 503 (1927), and have selectively prosecuted the Petitioner in the Crawford case in an unconscionable scenario apparently overlooked by Rep. Eckhardt.

Trial in the Crawford case, which has been estimated by the prosecution to last 12-14 weeks, is now scheduled to begin March 4, 1985 in Houston, Texas. This will be particularly burdensome for the Petitioner and his family.

This supplementary brief completes the picture of a situation of abuse of power by the Government lawyers, which includes their violation, with immunity, of laws they should be enforcing, e.g. 18 U.S.C. §1001 and 18 U.S.C. §371, and circumvention of the Eckhardt provisions of the F.C.P.A. The Petitioner respectfully asks the Court to issue its Writ of Certiorari.

Respectfully submitted,

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